Filed 3/2/16 P. v. Munoz CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MANUEL PETER MUNOZ, Defendant and Appellant.	2d Crim. No. B262422 (Super. Ct. No. 1441604) (Santa Barbara County)

Manuel Peter Munoz appeals from the judgment following his conviction by jury of five counts of forcible lewd act upon a child (Pen. Code,[1] § 288, subd. (b)(1)). The jury also found true allegations that the offenses involved more than one victim, and that counts 1, 2 and 3 were committed on separate occasions. (§ 667.61, subds. (a), (c)(4), (e)(4), (i).) The trial court sentenced appellant to an aggregate term of 75 years to life in prison. He contends that the court erred by instructing the jury that charged sexual offenses could be used as disposition evidence. We affirm.

[1] All statutory references are to the Penal Code unless stated otherwise.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case

The victims of appellant's crimes are his grandsons, A.B. and M.B. Their mother, C., is appellant's daughter. She and her husband, A., have another child, A. Jr. Appellant lived in their home for several years, and usually slept on a couch or in a bunk bed with M.B.

M.B. started kindergarten in August 2007. Appellant picked him up after school and spent several hours with him every day, while other family members were at school or work. At trial, M.B. testified that sometimes when they were alone, appellant would lock the door and gate, and manipulate them so that he would hear if anyone returned home. On several occasions, appellant told M.B. to go in the bedroom and remove his pants and underwear, where he would touch M.B.'s genitals for five or ten minutes. M.B. complied because he feared appellant's threats to hit him, or to "throw him in a cage or sleeping bag." Sometimes appellant directed M.B. to touch appellant's penis until he said M.B. could stop. If M.B. refused, appellant would grab him and hit him with a belt or another object. At some point, appellant also started to rub his penis across M.B.'s bare buttocks. Appellant directed M.B. not to tell anyone about the molestation, and said if he did tell, appellant would lie about it and hit M.B. M.B. was afraid to tell anyone about it, and he always felt scared after appellant started touching him.

In March 2009, C. and A. learned that M.B. had touched their young niece's "privates." M.B. initially denied, then admitted that he touched her. C. asked M.B. if anyone "had touched [his] pee-pee." After repeated questioning, M.B. "just motioned yes," and cried but did not name the person who had touched him. Appellant arrived home while M.B. was crying and asked what had happened. After M.B. left the room, A. and C. explained that someone had touched M.B. but they did not know the molester's identity. Appellant cried and said, "I can't believe it."

A few days later, C. contacted Child Abuse Listening and Meditation (CALM), a child abuse treatment program, to get help for M.B. On April 1, 2009, M.B.

started seeing Christine Scott-Hudson, an art therapist. On April 24, 2009, during his second session with Scott-Hudson, M.B. displayed agitated behavior while describing the time he spent alone with appellant, and made statements that she described as "red flags." She advised C. and A. she would file a mandatory report with Child Welfare Services (CWS) and advised them not to leave their sons alone with appellant. A. told appellant that M.B.'s therapist had observed "some red-flag warnings that revolved around" appellant and asked him to leave their home. Appellant asked, "So if I leave, will this just . . . be over?" He did not offer an explanation or claim he was innocent. He moved from their home, and stopped speaking with A. and C. M.B. continued his therapy for several years and usually saw Scott-Hudson three or four times a month.

M.B.'s brother, A.B., testified that while the family lived on Sycamore Lane, he overheard appellant having a telephone conversation. Appellant said, "I gotta get out of here. Something's going on. I think they know it's me. I gotta get out of here." After a pause, he said, "I know, but are you going to come get me? I need to get out of here. They know it's me." The family moved from Sycamore Lane in August 2009.

In 2010, several months after M.B. started his therapy, A.B. sent C. a text message saying that appellant had touched A.B. In July 2011, A.B. and M.B. participated in a family therapy session with Scott-Hudson. A.B. said he felt bad he had not been able to help M.B. by speaking up earlier. In October, A.B. started individual therapy with Scott-Hudson, and saw her about eight times a month.

M.B. continued his therapy with Scott-Hudson. During a session on May 20, 2013, he pointed at his crotch after referring to the "bad stuff" appellant did to him. Scott-Hudson contacted CWS and law enforcement. He subsequently told police officers that for about a year his grandfather would have him pull his pants down and would then touch M.B.'s genitals.

In 2013, A.B. told Scott-Hudson that appellant sexually abused him on two occasions. He described the two incidents to Adolfo Garcia of CALM on August 13, 2013, and in his trial testimony. A.B. testified that appellant first molested him when he

was 10 years old, on the night of his mother's birthday, in December 2006. A.B. was sleeping in his bed, and awoke to find appellant's hand touching his genitals, over his clothing. When he tried to get away, appellant pushed A.B., squeezing his genitals. He said that if A.B. told anyone about the incident, someone else was going to "get it." That frightened A.B. Appellant also said nobody would believe A.B.

The second time appellant molested A.B. was in July 2007, when he took A.B. and his brothers on a trip to Northern California, without A. or C. During the trip, appellant asked A.B. to shower with him so they would not waste water. When they showered, appellant grabbed and pulled A.B. toward him and started "moving up and down [A.B.'s] privates" with his hand for about 10 to 20 seconds. A.B. felt appellant's erect penis move across his buttocks, and felt it going in and out of his "but crack" repeatedly.

Anthony Urquiza, a psychologist and the director of the University of California Davis medical center's pediatric child abuse treatment program, provided expert testimony concerning the Child Sexual Assault Accommodation Syndrome (CSAAS). He explained the five components of the syndrome: secrecy, a sense of helplessness, entrapment and accommodation, delayed and unconvincing disclosure, and retraction. He testified that child sexual abuse victims often keep the abuse a secret; the victim and the perpetrator usually know each other; it is not uncommon for the perpetrator to pressure the victim to remain silent; and the victim often feels helpless. Delayed and unconvincing disclosure refers to the gradual and sometimes inconsistent revelations of the abuse, contrary to a common misperception that a child would immediately and fully recount the traumatic events. The closer the proximity between the perpetrator and the victim, the longer it takes for the victim to disclose the abuse. It is common for children to disclose the abuse for the first time in vague and ambiguous terms. Children may deny the abuse when asked about it, because they may be embarrassed and humiliated by the abuse. Lacking a full understanding of sexually abusive behavior, a child may experiment by engaging in sexually inappropriate behavior with another child, which is called sexually reactive behavior. Male victims are more

reluctant to report abuse, since most molesters are male and the victim may feel more ashamed or humiliated at being sexually abused by a male. False allegations of child sexual abuse are uncommon. Studies indicate that about one to nine percent of such allegations are false.

Defense Evidence

Appellant testified that he never sexually molested M.B. or A.B. and never physically or sexually abused any of his grandchildren or stepchildren. He testified that because of his diabetes, he has been impotent and unable to get an erection since 2007.

Santa Barbara police detective Corina Wondoloski investigated a CWS referral concerning possible sexual abuse of M.B. and A.B., and monitored their forensic interviews. She terminated her investigation in 2010 because their interviews did not provide adequate information.

Bradley McAuliff, a professor of psychology at California State University, Northridge and the University of Southern California Law School, testified as an expert in children's suggestibility and memory and forensic interviewing. In response to questions based upon the evidence, he opined that the manner in which questions are posed to children may lead to unfounded allegations. He also opined that art therapy may contaminate a child's memory if the therapist has a preexisting belief that the child has been abused and the therapy continues for many years.

Appellant called several character witnesses who testified that he was honest, and that he had cared for other children without physically or sexually abusing them.

Prosecution Rebuttal

The prosecution called appellant's grandson, A. Jr., as a rebuttal witness. He testified about three incidents in which appellant was violent with him. He told C. about one of the incidents and appellant accused him of lying.

DISCUSSION

Appellant claims that the trial court violated his due process by instructing the jury that evidence of charged offenses could be used to show his disposition to

commit other charged offenses. Appellant bases this claim on the court's use of CALCRIM No. 1191. Respondent argues that appellant waived this claim by failing to challenge CALCRIM No. 1191 on the same ground at trial. Waiver aside, the claim lacks merit because the court did not instruct the jury that it could consider charged offenses as disposition evidence.

The trial court instructed the jury with CALCRIM No. 1191 (Evidence of Uncharged Sex Offense). As given it states: "The People presented evidence that the defendant committed the crimes of Forcible Lewd Act Upon a Child that were both charged and not charged in this case. These crimes are defined for you in these instructions. [¶] You may consider an *uncharged* offense as to a charged offense only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the *uncharged* offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit Forcible Lewd Acts upon a Child, as charged here. If you conclude that the defendant committed the *uncharged* offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Forcible Lewd Act Upon a Child. The People must still prove each charge beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose except for the limited purpose of Propensity and credibility . . . ." (Italics added.)

The trial court properly instructed the jury with CALCRIM No. 1191. (*People v. Anderson* (2012) 208 Cal.App.4th 851, 895-898; *People v. Cromp* (2007) 153 Cal.App.4th 476, 480.) Appellant, however, asserts that "[a]lthough the language of No 1191 as given referred to 'uncharged offenses,' the prosecutor made it clear in argument

what the instruction meant." In essence, appellant concedes that the court did not instruct the jury it could use *charged* offenses as disposition evidence. He nonetheless claims error as if the court had done so. Specifically, he cites the prosecutor's comments that if the jury believed A.B., it could consider his testimony about what appellant "did to" him (the charged offenses) "in analyzing whether [appellant was] guilty of" the charges alleging he molested M.B.[2]

Appellant's claim lacks merit because it is based on the false premise that the trial court's instructions incorporated the prosecutor's comments concerning the use of charged offenses. Apart from the fact that such comments were not in the instructions, the court explicitly instructed the jury, as follows: "You must follow the law as I explain it to you . . . . If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions. [¶] Pay careful attention to all of these instructions and consider them together." (CALCRIM No. 200.) The court further instructed the jury that the fact a criminal charge had been filed against appellant was not evidence the charge was true; that the jury could not be biased against appellant because he had been charged with a crime; that appellant was presumed to be innocent and the prosecution had to prove his guilt beyond a reasonable doubt; that appellant was entitled to the benefit of the doubt as to reasonable conclusions drawn from circumstantial evidence; that the jury must unanimously agree appellant committed the specific acts alleged as to each count within the pertinent period of time; and that each count charged a separate crime and must be considered and decided separately. We presume that jurors understand and follow the court's instructions, treat them as a statement of law, and regard the prosecutor's statements as advocacy. (*People v. Osband* (1996) 13 Cal.4th

[2] Appellant makes an ancillary, meritless claim that the trial court erred by allowing the prosecutor to argue that the jury could consider charged offenses to infer disposition. Our Supreme Court held that a jury can be properly instructed that evidence of charged sexual offenses may be used to infer disposition under Evidence Code section 1108 in *People v. Villatoro* (2012) 54 Cal.4th 1152, 1160-1164. The trial court properly applied *Villatoro* in permitting the prosecutor's argument. Appellant acknowledges the *Villatoro* holding, but invites us to revisit the issue. We decline to do so.

622, 717; *People v. Morales* (2001) 25 Cal.4th 34, 47.) Moreover, even had the court erroneously instructed the jury, the overwhelming evidence of guilt would preclude our finding such error to be prejudicial under any standard of review.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Michael J. Carrozzo, Judge

Superior Court County of Santa Barbara

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

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